

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
JOHNNY C. PITTS,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 85-146

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

THIS MATTER, the appeal from Department of Ecology Order No. DE 85-529 ordering appellant to cease surface water diversion from the Okanogan River immediately and ordering appellant to remove a pump within 10 days, came on for hearing before the Pollution Control Hearings Board, Lawrence J. Faulk (presiding), and Wick Dufford, at a formal hearing in Wenatchee, Washington, on April 15, 1986.

Appellant represented himself. Respondent Department of Ecology appeared by Allan T. Miller, Jr., Assistant Attorney General. Court reporter Karen D. Canfield of Moses Lake recorded the proceedings.

1 Witnesses were sworn and testified. Exhibits were examined. From
2 testimony heard and exhibits examined, the Board makes these

3 FINDINGS OF FACT

4 I

5 Respondent Washington Department of Ecology (WDOE) is a state
6 agency charged with the allocation and regulation of surface and
7 ground water usage within the state.

8 II

9 Appellant Pitts leases a piece of property from the Douglas County
10 Public Utility District (PUD) in the SW 1/4 NE 1/4 SW 1/4 of Section
11 17, Township 32, Range 25 L, within the exterior boundaries of the
12 Colville Indian Reservation in Okanogan County. There is a well
13 located on this piece of property and the Okanogan River abuts one
14 boundary of the parcel. The instant controversy involves this well
15 and a surface water diversion from the Okanogan River.

16 III

17 The land in question was a part of an allotment held by Harry
18 Charley, a member of the Colville Confederated Tribe, in 1961 when it
19 was leased to Neil and Winnie Walton. The Waltons dug the well and
20 began irrigating the acreage for alfalfa through a sprinkler system
21 using water from the well.

22 In 1965 the PUD purchased the property in connection with the
23 Well's Dam project and the parcel passed out of Indian ownership. The
24 Waltons continued in possession as lessee's of the PUD and continued
25 to irrigate hay crops from the well until 1975.

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER
PCHB No. 85-146

1 IV

2 On April 2, 1974, the PUD applied for a ground water permit for
3 withdrawals from the well on the subject property. The WDOE assigned
4 the number G4-22859 to the application. The PUD applied for 400
5 gallons per minute, 160 acre feet per year for irrigation of forty
6 acres from April 1 to October 31.

7 V

8 Sometime in 1974, WDOE adopted a moratorium on processing
9 applications for appropriations within Indian reservations because
10 the agency was involved in law suits dealing with jurisdictional
11 questions over water rights and water allocation in such areas. As a
12 result, they believed they were obliged to hold pending applications
13 and permits in abeyance until the adjudication of these law suits was
14 completed. The PUD's application was included in the moratorium.

15 VI

16 In 1976, Mr. Pitts leased the property from the PUD and purchased
17 the pump and sprinkler system from Mr. Walton. The well was
18 experiencing excessive sand which caused the turbine pump to burn up.
19 Therefore, Pitts traded it for a centrifigal pump and placed the new
20 pump in the river, approximately 600 feet away from the well. He
21 testified that he has been irrigating since 1976 by withdrawing water
22 from the Okanogan River.

23 VII

24 On February 7, 1984 WDOE, having lifted the moratorium, approved
25 the application of the PUD for withdrawal of ground water from the

1 well, and issued permit G4-22859, subject to regulation when predicted
2 minimum flows in the Columbia River fall below specified levels.

3 VIII

4 On February 28, 1985, DOE's inspector tried to conduct a proof of
5 appropriation inspection, but owing to snowy conditions couldn't find
6 the well. She did, however, notice the diversion works in the river.
7 After her inspection she asked the PUD what was going on.

8 IX

9 On March 5, 1985, the PUD wrote a letter to WDOE explaining that
10 the well in question had been pulling in sand causing excessive wear
11 on the bowls of the pump. Because of this, the letter went on to
12 indicate that Mr. Pitts was drawing water from the Okanogan River for
13 irrigation purposes.

14 X

15 On March 18, 1985, WDOE wrote a letter to the PUD stating that
16 drawing water from the Okanogan River was not authorized under the
17 ground water permit issued to the PUD. The letter also indicated that
18 WDOE would not issue a certificate under ground water permit No.
19 G4-22859 until a pump was installed and in use in the well.

20 XI

21 On May 15, June 4 and June 5, 1985 WDOE personnel drove to the
22 property in question and observed the operation of a sprinkler system
23 utilizing water from a pump station on the Okanogan River.

24 XII

25 On July 19, 1985, WDOE issued a regulatory order No. DE 85-529,
26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER
PCHB No. 85-146

1 which provided in pertinent part as follows;

2 The Department of Ecology is responsible for
3 the supervision of public waters within the state
4 and their appropriation, diversion (withdrawal),
5 storage (dam safety), and use.

6 Department of Ecology regional staff, while
7 conducting a proof examination, found that the
8 owner and/or lessee, Douglas County PUD and Jack
9 Pitts respectively, developed a surface water
10 diversion for pumping from the Okanogan River.
11 Regional staff observed unauthorized irrigation
12 pumping with the system on May 15, 1985, June 4,
13 1985, and June 5, 1985 in violation of RCW
14 90.03.010 and 90.03.250.

15 IT IS ORDERED THAT Douglas County PUD and Jack
16 Pitts shall, upon receipt of this Order, take
17 appropriate action in accordance with the following
18 instructions:

19 Cease surface water diversion from the
20 Okanogan River immediately and remove the pump
21 facility from the river within ten (10) days from
22 the date of receipt of this Order
23

24 Feeling aggrieved by this order appellant appealed to this Board
25 on August 8, 1985.

26 XIII

27 In November of 1985, Mr. Pitts was granted a permit by the
Colville Confederated Tribes to withdraw water from the Okanogan River
for irrigation of an area which includes the land covered by the
permit issued by the state to the PUD. This permit (No. 85-08-07-025)
is entitled: "Permit to the Waters of the Colville Indian
Reservation."

28 XIV

29 Mr. Pitts testified that he believed the waters of the well and

1 the waters of the Okanogan River are essentially the same. He said
2 that fluctuations in the river level are directly reflected in the
3 static level of water in the well. WDOE's testimony was that the
4 agency believes there is a direct hydraulic connection between the
5 well and the river. This explains why the agency made withdrawals
6 under the PUD's groundwater permit subject to interruption when
7 specified instream flows are not met. We find that significant
8 hydraulic continuity exists between the well and the river.

9 XV

10 Mr. Pitts is exploring various approaches with WDOE to secure
11 their authorization of his diversion from the river. At the time of
12 issuance of the cease and desist order under appeal (July 19, 1985),
13 there was neither an approved change in point of withdrawal for the
14 PUD's existing ground water permit nor a separate surface water permit
15 for diversion from the river.

16 XVI

17 Any approval WDOE might give to a river diversion at this locale
18 would be made subject to established minimum flows for the Okanogan
19 River. If WDOE's authorizations govern, this would mean interruption
20 of the appropriation far more frequently than is likely under the
21 present permit G4-22859 which is conditioned on Columbia River flows.

22 XVII

23 Any Conclusion of Law which is deemed a Finding of Fact is hereby
24 adopted as such.

25 From these Findings of Fact, the Board comes to these

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER
PCHB No. 85-146

CONCLUSIONS OF LAW

I

The groundwater code, Chapter 90.44 RCW, was enacted in 1945. Its purpose is stated in RCW 90.44.020:

This chapter, regulating and controlling ground waters of the state of Washington shall be supplemental to chapter 90.03 RCW, which regulates the surface waters of the state, and is enacted for the purpose of extending the application of such surface water statutes to the appropriation and beneficial use of ground waters within the state.

II

The foundation of this state's water law is the principle of priority of rights. The surface water code of 1917 expresses this concept in RCW 90.03.010, as follows:

The power of the state to regulate and control the waters within the state shall be exercised as hereinafter in this chapter provided. Subject to existing rights all waters within the state belong to the public, and any right thereto, or to the use thereof, shall be hereafter acquired only by appropriation for a beneficial use and in the manner provided and not otherwise; and, as between appropriations, the first in time shall be the first in right. (Emphasis added)

III

The Legislature has given WDOE the job of allocating the resource, through the issuance of permits. RCW 90.03.250 in pertinent part, reads as follows:

Any person, municipal corporation, firm, irrigation district, association, corporation or water users' association hereafter desiring to appropriate water for a beneficial use shall make an application to the supervisor of water resources for a permit to make such appropriation, and shall not use or

1 divert such waters until he has received a permit
2 from such supervisor as in this chapter provided.

3 IV

4 The Legislature, likewise, has given the WDOE the job of
5 regulating the use of water under the priority system. RCW
6 43.21.130(3) explicitly requires the agency to "regulate and control
7 the diversion of water in accordance with the rights thereto."

8 One of the legislatively created tools for carrying out this
9 function is the regulatory order. RCW 43.27A.190 states in pertinent
10 part:

11 Notwithstanding and in addition to any other powers
12 granted to the department . . . whenever it appears
13 . . . that a person is violating or is about to
14 violate any of the provisions of the following:

15 (1) Chapter 90.03 RCW; or

16 (2) Chapter 90.44 RCW; or

17 . . .

18 (6) Any other chapter or statute the director
19 . . . is charged with administering . . . the
20 director . . . or an authorized assistant, may
21 cause a written regulatory order to be served upon
22 said person The order shall specify the
23 provision of the statute, rule, regulation,
24 directive or order alleged to be or about to be
25 violated and the facts upon which the conclusion of
26 violation or potential violation is based, and
27 shall order the act constituting the violation or
potential violation to cease and desist or, in
appropriate cases, shall order necessary corrective
action to be taken with regard to such acts within
a specific and reasonable time.

V

This case concerns an order issued under the foregoing section. The order cites Mr. Pitts' installation of pumping facilities in the Okanogan River. It states this is in violation of RCW 90.03.010 and 90.03.250. Mr. Pitts is instructed to "Cease surface water diversion from the Okanogan River immediately and remove the pump facility from the river within ten (10) days from the date of receipt of this order."

The violations charged by WDOE relate to the lack of a permit issued pursuant to state law for diversions directly from the river. No one argues that there is, in fact, any such state-issued permission. However, the lack of state authorization does not necessarily make the diversion unlawful. Federal law must also be considered.

VI

The applicable federal law has its roots in the so-called Winters doctrine of reserved water rights. Winters v. United States, 207 U.S.564 (1908).

When title to allotted land passes from an Indian to a non-Indian, the appurtenant right to share in tribal reserved waters passes with it. The non-Indian successor receives a priority as of the date of the creation of the Indian reservation to the quantity of water being utilized at the time title passes, plus an amount he puts to beneficial use with reasonable diligence following the transfer of title. See Colville Confederated Tribes v. Walton, 647F.2d 42 (9th Cir. 1981); United States v. Adair, 723 F.2d 1394 (9th Cir. 1983);

1 United States v. Anderson, 736 F.2d 1358 (1984).

2 VII

3 If there is here a right derived from federal law to divert river
4 water through succession to the interest of the Indian allottee, we
5 conclude that such right is an "existing right" which must be
6 recognized and respected by the state under RCW 90.03.010.

7 VIII

8 In carrying out its duty to "regulate and control the diversion of
9 water in accordance with the rights thereto," WDOE lacks the authority
10 to adjudicate rights. Where claimed rights have not been adjudicated,
11 or are not evidenced by a state-issued authorization, WDOE must make
12 tentative judgments as to their validity. See, Funk v. Bartholet, 157
13 Wash. 584, Pac. 1018 (1930); Riddle v. DOE, PCHB No. 77-133 (1978);
14 Brownell v. DOE, PCHB No. 85-135 (1985).

15 Such a tentative judgment in this case requires evaluation of the
16 likelihood that the surface diversion from the river is authorized by
17 federal law.

18 IX

19 Mr. Pitts argues that he is, in effect, exercising a right derived
20 from an Indian allottee. He points out that he is irrigating lands
21 which were already in irrigation when the land passed from Indian
22 ownership. The only change is in the point of diversion or
23 withdrawal. As to this, he asserts that the change from the well to
24 the river should be of no consequence since the source of the
25 appropriation is essentially the same in either case.

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER
PCHB No. 85-146

1 WDOE argues that Pitts as a lessee lacks standing to raise the
2 issue of successors' rights and, that, in any event, the diversion
3 initiated in 1976 came too late to meet the "reasonable diligence"
4 requirement for unappropriated waters, following transfer out of
5 Indian ownership.

6 Pitts, thus, views his river diversion as a continuation of a
7 previously exercised right to irrigate. WDOE views it as an attempt
8 to make a new appropriation from a previously unappropriated share of
9 the reserved right which was transferred to the PUD in 1965.

10 X

11 We do not agree that Pitts lacks standing to raise the
12 successor-in-interest question. We hold that he has a sufficient
13 personal stake in the controversy, under the facts, to assert the
14 issue as a defense to this enforcement action. If there is a
15 federally derived right here, there is no evidence that there is any
16 impediment to his using it as lessee of the PUD.

17 XI

18 We have serious doubts about WDOE's tentative conclusion that the
19 river diversion is not the continuation of the already exercised
20 portion of the reserved right transferred to the PUD.

21 Under state law, WDOE permission is required to validate a change
22 in point of diversion or withdrawal. RCW 90.03.380, RCW 90.44.100. If
23 significant hydraulic continuity is present, presumably a ground water
24 withdrawal can be changed to a surface water diversion. See RCW
25 90.44.030, RCW 90.54.020 (8).

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER
PCHB No. 85-146

However, nothing brought to our attention shows that there is any comparable approval mechanism required as a condition precedent to a change in point of diversion or withdrawal for the kind of federal-law-based right under discussion.

We suspect that any definitive decision about this matter would make reference to the common law, under which such changes by self help were permissible, absent interference with intervening rights. See In re Alpowa Creek, 129 Wash. 9, 224 Pac.29 (1929). No such interference was shown here.

Finally, we note the issuance of a permit for the river diversion by the Colville Tribe. Although this permit was issued after the WDOE's cease and desist order and although we do not know the precise legal rationale for its issuance, the permit does suggest that the non-existence of a federally derived right for the diversion Mr. Pitts has been making is far from clear and obvious.

XII

In the presence of such ambiguity in the legal situation, we hold that WDOE improperly issued the cease and desist order at issue. Under all the facts and circumstances, the agency was not justified in presuming the illegality of Mr. Pitts diversion.

XIII

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions, the Board enters this

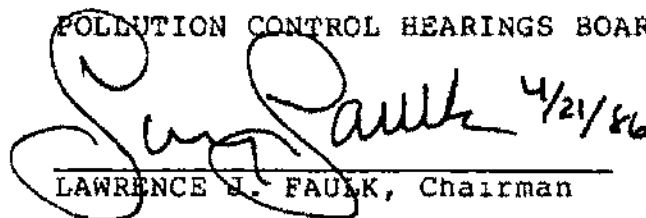
FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
PCHB No. 85-146

ORDER

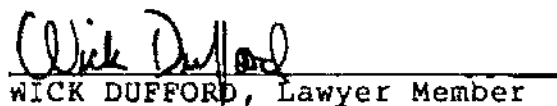
Department of Ecology Order No. 85-529 is reversed.

DATED this 21st day of April, 1986.

POLLUTION CONTROL HEARINGS BOARD

 4/21/86

LAWRENCE J. FAULK, Chairman



WICK DUFFORD, Lawyer Member